



June 7, 2012

Mr. John Traversy  
Secretary General  
Canadian Radio-television and  
Telecommunications Commission  
Ottawa, Ontario K1A 0N2

Filed Electronically

Dear Mr. Traversy:

**Re: Broadcasting Notice of Consultation CRTC 2012-277 (“BNC 2012-277”)  
High Fidelity HDTV Inc. (“High Fidelity”)  
Application 2012-0105-3**

1. The Canadian Media Production Association (the CMPA)<sup>1</sup> welcomes the opportunity to comment regarding the above-referenced application in which High Fidelity seeks authority to change its effective control and control of its broadcasting subsidiaries to Blue Ant Media Inc. (“Blue Ant”).
2. The CMPA **supports** the application and the applicant’s proposed tangible benefits package *subject to the CRTC 1) requiring that a minimum of 75% of the tangible benefits be allocated to independently-produced programming; and 2) including advisory language regarding Terms of Trade in its eventual decision on this application.*

### **The Application**

3. Consistent with the Commission’s Tangible Benefits Policy (“the Benefits Policy”), the applicant (hereafter to be referred to as Blue Ant) has proposed a tangible benefits package representing 10% of the claimed value of the transaction. However, contrary to the Benefits Policy, Blue Ant seeks to allocate up to half of the benefits to its own in-house productions.
4. The CMPA relies on the Commission’s expertise to determine the true value of this transaction. Regardless, the associated benefits package should still amount to 10% of

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<sup>1</sup> The CMPA represents the interests of screen-based media companies engaged in the production and distribution of English-language television programs, feature films, and new media content in all regions of Canada. The CMPA’s 400 member companies are significant employers of Canadian creative talent and assume the financial and creative risk of developing original content for Canadian and international audiences.

the final and full amount, consistent with the Benefits Policy and Blue Ant's commitment.

5. For the following reasons, the CMPA opposes Blue Ant's request to pay itself up to half of the benefits funds which will flow from this transaction. Instead, consistent with the Benefits Policy as it should be applied in these circumstances, the CMPA submits that Blue Ant should be required to allocate a minimum of 75% of the tangible benefits to independently-produced programming.

### **Allocating Benefits to Independently-Produced Programming**

6. Throughout the years, the CRTC's application of its Benefits Policy has contributed enormously to the production of new, high quality and entertaining Canadian programming. Moreover, by requiring that benefits expenditures flow predominantly to third parties, such as independent producers, and to different regions of the country, the policy has played a critical role in fostering a diversity of programming voices in the Canadian broadcasting system and expanding the breadth and depth of creative ideas now presented on Canadian television and other screens.
7. From the start, the Commission has emphasized the importance of allocating benefits funding to projects which benefit the broadcasting system as a whole, with allocating funds to independently-produced programs being an important way to ensure this objective is met. In Public Notice CRTC 1989-109, entitled *Elements Assessed by the Commission in Considering Applications for the Transfer of Ownership or Control of Broadcasting Undertakings*<sup>2</sup>, the Commission stated that "an applicant is expected to propose a specific package of significant and unequivocal benefits that will yield measurable improvements to the communities served by the broadcasting undertaking and to the Canadian broadcasting system." Subsequently, when the Commission chose to identify the types of television programming benefits it typically accepts, the first example it listed was "the production and development of new programming... particularly in "under-represented" categories; and productions involving the independent production sector."<sup>3</sup>
8. Contrary to Blue Ant's suggestion, the purpose of allocating benefits funds to independently-produced programs is not to address "a crisis of funding in the independent production sector"<sup>4</sup> but to ensure that benefits flow to diverse, third-party programming sources rather than simply being returned to the purchasing broadcaster for its own use.

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<sup>2</sup> <http://www.crtc.gc.ca/eng/archive/1989/PB89-109.htm>.

<sup>3</sup> Public Notice CRTC 1993-68, *Application of the Benefits Test at the Time of Transfers of Ownership or Control of Broadcasting Undertakings*, <http://www.crtc.gc.ca/eng/archive/1993/PB93-68.HTM>. Emphasis added.

<sup>4</sup> Applicant's deficiency response dated 22 February 2012, at p. 8.

9. Indeed, the Commission has been critical of attempts by broadcasters to allocate benefits funding to their own in-house activities rather than to independently - produced programs. For example, in approving the 1996 transfer of TSN/RDS and Discovery Channel to Canadian Telacquisition Inc., the Commission was clear that a growing trend in that direction should stop:

The Commission has noted a trend in recent applications for authority to transfer ownership or control, including this one, towards the offering of benefits which are largely directed to the applicant itself, rather than to third parties or to the Canadian broadcasting system as a whole...

The Commission reminds the applicant in this transaction, as well as future applicants, that while the Commission will continue to assess benefits of applications on a case-by-case basis, it will also examine the proportion of benefits that are directed to either third parties or the Canadian broadcasting system as a whole.<sup>5</sup>

10. Consistent with that position, the Commission subsequently rejected a “self-serving” proposal to allocate benefits funding to in-house programs when the ownership of those same programming services next changed hands:

49. The Commission has, however, continuing concerns about two of the proposed programming benefits. These relate to coverage of the *Canada Games* and *Les Jeux du Québec*. On a combined basis, these two initiatives account for \$11.7 million, or about one third of CTV’s total tangible benefits package of \$35.22 million.

50. The Commission notes that both of these initiatives relate to programming that would be shown on NetStar services and would be produced by the licensee itself, not by independent producers.

51. While the Commission accepted similar initiatives as benefits when it approved the transfer of TSN/RDS and Discovery Channel to Canadian Telacquisition [sic] Inc., Decision CRTC 96-75 also included the following statement:

The Commission reminds the applicant in this transaction that, while the Commission will continue to assess benefits of applications on a case-by-case basis, it will also examine the

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<sup>5</sup> Decision CRTC 96-75, *Transfer of control of TSN, RDS, and the Discovery Channel, and the transfer of the partnership interest of one of the partners in Viewer's Choice Canada*, <http://www.crtc.gc.ca/eng/archive/1996/DB96-75.HTM>.

proportion of benefits that are directed either to third parties or the Canadian broadcasting system as a whole.

52. The Commission considers that it is not appropriate to accept initiatives relating to broadcasting the *Canada Games* and *les Jeux du Québec* as benefits, regardless of the fact that the *Canada Games* were accepted as a benefit by the Commission in 1996. When the Commission accepted the *Canada Games* as a benefit in the last ownership transaction involving NetStar, it indicated its concern that the proposed benefits were self-serving. The Commission considers that the *Canada Games* and *les Jeux du Québec* are sports events that fit within the normal mandate of the national sports specialty services, regardless of their appeal to mainstream audiences. *The Commission further notes that there would be no third party benefit to independent producers since these events would be produced by the licensee.*
53. The Commission therefore requires CTV, as a condition of approval of this transaction, to reallocate the \$11.7 million of its benefits proposal related to the *Canada Games* and *Les Jeux du Québec* to other initiatives. *These new initiatives must involve payments to independent third parties not related to the licensee...*<sup>6</sup>

11. Later that year, in approving BCE's first purchase of CTV, the Commission again reinforced that expenditures proposed as benefits are to flow predominantly to third parties, such as independent producers. Moreover, in doing so, the Commission set the benchmark in those circumstances at 95%:

At the same time, the Commission will insist that its requirements be met regarding the benefits package. Specifically, it will require that all expenditures proposed as benefits be truly incremental, and that they flow predominantly to third parties, such as independent producers... It will also require the applicant to increase the proportion of incremental priority program expenditures that are to be directed to independent Canadian production companies. The Commission notes in this regard that, under the applicant's commitments, 80% of the proposed incremental expenditures on priority programming was to have been made through independent producers. The Commission, however, requires the applicant to direct a minimum of 95% of its incremental priority programming expenditures to such producers.<sup>7</sup>

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<sup>6</sup> Decision CRTC 2000-86, *CTV Inc. on behalf of The Sports Network Inc. (TSN), Le Réseau des Sports (RDS) Inc. (RDS), and 2953285 Canada Inc. operating as The Discovery Channel*, <http://www.crtc.gc.ca/eng/archive/2000/DB2000-86.htm>. Emphasis added in pars 52 and 53.

<sup>7</sup> Decision CRTC 2000-747, *Transfer of effective control of CTV Inc. to BCE Inc.*, <http://www.crtc.gc.ca/eng/archive/2000/DB2000-747.htm>, at par. 32.

12. Notably, those last two decisions came soon after the Commission issued its 1999 TV Policy Framework<sup>8</sup>: while Blue Ant seems to suggest<sup>9</sup> that the Commission, in that 1999 policy document, distanced itself from the requirement to allocate benefits to independently-produced programs, that was clearly not the case. In fact, the 1999 TV Policy Framework emphasized that, while the Commission established a new benchmark for the *amount* of benefits payable, “[a]ll other policies with respect to transfer of ownership or control will remain in place.”<sup>10</sup> This included the Commission’s policy as to the appropriate primary *recipient* of the benefits, namely the independent production sector.
13. Moreover, the Commission continues to insist that programming benefits flow to independently-produced programs, and not to the party involved in the transaction. In its 2010 decision approving ZoomerMedia’s purchase of various broadcasting assets, the Commission once again rejected a proposal to direct benefits funds to in-house productions:

The Commission questions ZoomerMedia's proposal to allocate funding to Vision TV Network, the current licensee of VisionTV, for the creation of audiovisual elements called Broadband Initiative/Spiritual Shorts. The Commission generally requires applicants to demonstrate that expenditures proposed as benefits will flow predominantly to third parties, such as independent producers. *The Commission considers it inappropriate to allocate tangible benefits to the party involved in the transaction.* Accordingly, the Commission directs ZoomerMedia and ONE to submit, within 30 days of the date of this decision, an alternate proposal to the Broadband Initiative/Spiritual Shorts for approval by the Commission.<sup>11</sup>

14. Also in 2010, the Commission required Glassbox Television Inc., as a condition of approving its purchase of travel + escape from CTV, to confirm that *all* benefits expenditures for the Glassbox Travel Multiscreen Fund would be directed to independent producers.<sup>12</sup> In the current application, Blue Ant now proposes to allocate its benefits to that very same Fund.<sup>13</sup>

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<sup>8</sup> Public Notice CRTC 1999-97, *Building on success – a policy framework for Canadian television*, <http://www.crtc.gc.ca/eng/archive/1999/PB99-97.HTM>.

<sup>9</sup> *Ibid.*, above note 4, at p. 6.

<sup>10</sup> *Ibid.*, above note 8, at par. 23. Note that this statement was in bold type.

<sup>11</sup> Decision CRTC 2010-193, *Vision TV – Acquisition of assets; CHNU-TV Fraser Valley and CIIT-TV Winnipeg – Change in effective control; ONE: The Body, Mind and Spirit Channel – Change in effective control; Classical Digital, CFZM, CFMZ-FM, CFMZ-DR-1 Toronto, and CFMX-FM Cobourg – Corporate reorganization*, <http://www.crtc.gc.ca/eng/archive/2010/2010-193.htm>, at par. 26.

<sup>12</sup> Broadcasting Decision CRTC 2010-792, *travel + escape – Corporate reorganization (acquisition of assets), and transfer of ownership and control*, <http://www.crtc.gc.ca/eng/archive/2010/2010-792.htm>, at par. 9.

<sup>13</sup> Now to be renamed the Blue Ant Multiscreen Fund: see Applicant’s Supplementary Brief, at par. 40.

15. It is important to highlight that, while both ZoomerMedia and Glassbox were non-vertically integrated, independently-owned programming services, this fact did not lessen in any way the Commission’s reluctance to allow those broadcasters to allocate their benefits back to themselves. Accordingly, Blue Ant’s similar independent status does not create any new or special circumstances that would justify any different, self-serving treatment for it.
16. Also, contrary to Blue Ant’s suggestion, the relative percentages of benefits flowing to independently-produced programs as result of the Commission’s approval of the Shaw-Canwest<sup>14</sup> and BCE-CTV<sup>15</sup> transactions cannot serve as proxies in the current case. Even though CMPA was disappointed with the relative percentages in those two earlier decisions, we note that the on-screen benefits *not* flowing to independently-produced programs in both cases were allocated primarily (or exclusively) to local programming initiatives. The Commission has always considered expenditures on such local programming initiatives as being within the category of acceptable benefits, where the purchaser has committed to incremental investments in such programming.<sup>16</sup> Unlike Canwest and CTV, High Fidelity does not produce or broadcast local programming; accordingly, Blue Ant cannot rely on the allocation of benefits in the Shaw-Canwest and BCE-CTV decisions to support its case for special, self-serving treatment.
17. As well, contrary to Blue Ant’s suggestion, the CMPA submits that the CMF’s recent and highly controversial decision to amend its guidelines respecting the smallest broadcasters’ independent production requirements is irrelevant in regards to the Commission’s application of its Benefits Policy. Moreover, we note the CMF reviews and, as a result, often changes, its guidelines on a regular basis.
18. As Blue Ant has acknowledged, the Commission’s recent decision approving Blue Ant’s purchase of Glassbox<sup>17</sup> confirmed the appropriateness of requiring Blue Ant to allocate a minimum of 75% of its benefits to independently-produced programs. In that decision, the Commission pointed out that this requirement was consistent with its approach in the group-based licence renewals for English-language television groups.<sup>18</sup>

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<sup>14</sup> Broadcasting Decision CRTC 2010-782, *Change in effective control of Canwest Global Communications Corp.’s licensed broadcasting subsidiaries*, <http://www.crtc.gc.ca/eng/archive/2010/2010-782.htm>.

<sup>15</sup> Broadcasting Decision CRTC 2011-163, *Change in effective control of CTVglobemedia Inc.’s licensed broadcasting subsidiaries*, <http://www.crtc.gc.ca/eng/archive/2011/2011-163.htm>.

<sup>16</sup> *Ibid.*, above note 3.

<sup>17</sup> Broadcasting Decision CRTC 2011-585, *AUX TV, BITE Television and travel + escape – Change of effective control*, <http://www.crtc.gc.ca/eng/archive/2011/2011-585.htm>.

<sup>18</sup> *Ibid.*, at par. 23. Under its approach in the group-licensing renewals, the CRTC requires the licensees to allocate to independently-produced programs a minimum of 75% of their required spending on programs of national interest (“PNI”): see Broadcasting Decision CRTC 2011-441, *Group-based licence renewals for English-language television groups – Introductory decision*, <http://www.crtc.gc.ca/eng/archive/2011/2011-441.htm>.

19. Lastly, it is important to point out that, contrary to Blue Ant's suggestion, requiring it to adhere to the Benefits Policy by allocating a minimum of 75% of its benefits package to independently-produced programming will in no way eliminate its "ability to draw from within [its] own programming" or "prevent Canadian [independent broadcasters] from finding nimbler ways of competing."<sup>19</sup> Blue Ant will still be able to allocate the vast majority of its Canadian program spending for the High Fidelity services to its own in-house productions. Indeed, assuming for this purpose that High Fidelity's CPE for 2011 would be maintained at the same level for the seven-year period typically applicable to benefits packages, Blue Ant will still be able to allocate over 70% of its Canadian program spending each year to itself.<sup>20</sup>

## Terms of Trade

20. In its decisions approving the Shaw-Canwest and BCE-CTV transactions, the Commission advised the respective purchasers that, in the event that they did not reach a Terms of Trade Agreement with the CMPA prior to their upcoming licence renewal hearing, they would be required to file their substantive proposals with the Commission as part of the record of that hearing and the Commission would then establish appropriate provisions for Terms of Trade as part of its determinations.<sup>21</sup>
21. As the Commission is aware, its issuance of such an advisory in respect of those two transactions played an important role in leading to the CMPA's Terms of Trade Agreement with Shaw Media and Bell Media.
22. The licences for the High Fidelity services radX, HIFI, Oasis HD and eqhd are set to expire on 31 August 2013<sup>22</sup> and thus we expect the Commission to announce a proceeding to consider their respective licence renewals - as well as the licence renewals for various other independently-owned specialty services - in the near future. The CMPA anticipates that we will soon seek to initiate Terms of Trade negotiations with High Fidelity and the other independent broadcasters which will be involved in that upcoming process. Accordingly, and consistent with the Commission's past approach, the CMPA urges the Commission to include the same advisory language as in the above paragraph in its decision flowing from this proceeding.

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<sup>19</sup> Ibid., above note 4, at p. 9.

<sup>20</sup> As provided in the Applicant's Supplementary Brief, at pp 14-15, High Fidelity's CPE for 2011 was \$1.79 million. If the proposed benefits package of \$7.79 million is spread over 7 years, that equates to \$1.11 million per year. Accordingly, total annual Canadian programming expenditures would be \$2.9 million (\$1.79M + \$1.11M). Seventy-five percent (75%) of the annual benefits would be \$833,000 (\$1.11M x .75). Accordingly, Blue Ant could still spend \$2.07 million each year on its own in-house programming (\$2.9M – \$0.833M), or 71% of its programming budget (\$2.07M/\$2.9M).

<sup>21</sup> Shaw-Canwest: *ibid.*, above note 14, at par. 60. BCE-CTV: *ibid.*, above note 15, at par. 65.

<sup>22</sup> Broadcasting Decision CRTC 2011- 417, *Administrative Renewals*, <http://www.crtc.gc.ca/eng/archive/2011/2011-417.htm>.

All of which is respectfully submitted.

Sincerely,

*original signed by*

Jay Thomson  
Vice-President, Broadcasting Policy  
and Regulatory Affairs

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